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Law Offices of Joseph G. Dicks

January 9, 2003

Qualex International, Portals II
445 12th Street, SW
Room CY-B402
Washington, DC

Re: Comments of North County Communications with Notice of Lodgment

DA 02-3511

APPLICATIONS BY VERIZON MARLAND, INC., VERIZON WASHINGTON, DC. INC., AND VERIZON WEST VIRGINIA. INC. ET LA. FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN REGION INTERLATA SERVICE IN MARYLAND, WASHINGTON DC AND WEST VIRGINIA

WC DOCKET NO.: 02-384

Dear Sir:

Enclosed please find one copy of the Comments of North County Communications Corporation with the Notice of Lodgment regarding the above-referenced matter pursuant to the FCC requirements regarding service and overnight deliveries.

Very truly yours,

Law Offices of Joseph G. Dicks, APC

Joseph G. Dicks

Enclosures

No. of Copies rec'd 0+4
List ABCDE

cc: Client

DA 02-3511

APPLICATIONS BY VERIZON MARYLAND, INC., VERIZON WASHINGTON, DC, INC., AND VERIZON WEST VIRGINIA, INC. ET LA. FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN REGION INTERLATA SERVICE IN MARYLAND . WASHINGTON DC AND WEST VIRGINIA

W.C. DOCKET NO.: 02-384

COMMENTS
OF
NORTH COUNTY COMMUNICATION CORPORATION'S

January 9. 2003

COMMENTS

NCC has been involved in litigation with Verizon West Virginia arising out of VERIZON's anti-competitive activities. The anti-coinpetitive activities. however. are not limited to West Virginia They have occurred in New York and Illinois as well, where North County Communications is also involved in litigation with VERIZON. Insofar as the trial in the West Virginia matter has concluded, and we are awaiting the results of the Public Service Commission's decision substantial briefing has occurred, the contents of which are critical for the pui-poses of the current application by Verizon. Filed concurrently herewith is a Notice of Lodgement of the briefs North County Communications filed in the West Virginia action, which summarizes North County Communications' position with respect to Verizon's conduct and it's lack ofentitlement to provide long distance Services in West Virginia.

Also attached to the Notice of Lodgment and filed concurrently herewith are North County Communications briefing with respect to Verizon's 271 Application in West Virginia: in which North County Communications was granted leave to intervene and participate. That briefing also

summaries North County Communication's position with respect to VERIZON. Application currently before the FCC.

Finally staff counsel and staff experrs for the West Virginia Public Services Commission filed extensive briefings with respect to Verizon's conduct toward North County Communications in West Virginia These briefings, attached to the Notice of' Lodgement and tiled concurrently herewith, represent the independent analysis of a third part!'. (the staff Attorney's Office for the West Virginia Public Service Commission), which actively participated in the West Virginia complaint proceeding against Verizon The opinions and conclusions of the West Virginia Public Services Commission Staff Counsel, on their own, leave little doubt that VERIZON should have no part in the privilege of offering long distance communication services in West Virginia. To grant Verizon's Application in the face of overwhelming evidence that VERIZON continues to undermine market competitiveness, would reflect a regulatory abandonment of the principals upon which the Telecommunications Act are founded. 'The ***only*** reasonable course of action with respect to Verizon's application to pi-ovide long distant service in West Virginia is a flat out denial, pending further investigation into Verizon's conduct and its willingness to change its way.

Respectfully submitted,

Joseph G. Dicks
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CERTIFICATE OF SERVICE

I James V. Kelsh, counsel for North County Communications Corporation, do hereby certify that a copy of the foregoing Initial Brief of North County Communications Corporation in Support of Proposed Findings of Fact And Conclusions ot'Law has been served upon the following counsel of record this 25thday of November, 2002, in the manner so indicated:

VIA UPS OVERNIGHT DELIVERY
to
***0300* East Hampton Drive, Capitol Heights, MD 20743 to:**

Commission Secretary
Marlene H. Dortch
445 12th Street, SW
CY - B402
Washington DC 20554

Janice Myles
Wireline Competition Bureau
445 12th Street SW
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DA 02-3511

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WC DOCKET NO : 02-384

NORTH COUNTY COMMUNICATION CORPORATION'S NOTICE OF LODGMENT TO ITS COMMENTS

NORTH COUNTY COMMUNICATION CORPORATION hereby lodges true and correct copies of the following exhibits to its Comments filed herewith.:

Re: *Docket No. : 02-0254-T-C*

North County Communications Corporation
vs.
Verizon West Virginia

1.	North County Communications Corporation's Initial Brief in Support of Proposed Finds of Fact and Conclusions of Law	Exhibit A
2.	North County Communications Corporation's Proposed Finds of Fact and Conclusions of Law	Exhibit B
3.	Reply Brief of North County Communications Corporation	Exhibit C

Re: *Docket No. 02-0809-T-P*
Verizon West Virginia, Inc.

Petition in the matter of Verizon West Virginia Inc.'s compliance with Conditions ser forth in 47 U.S.C. §271(c)

4.	Initial Brief of North County Communications Corporation' in Support of Proposed Findings of Fact and Conclusions of Law §271(c)	Exhibit D

5.	North County Communications Corporation's Proposed Findings of Fact and Conclusions of Law	Exhibit E

Re *North County Communications Corporation*
vs.
Verizon West Virginia
Docket No.: 02-0254-T-C
***
NyNex Long Distance Company, dba Verizon Enterprise Solutions
Case No.: 02-0722-T-CN
***
Bell Atlantic Communications, Inc. dba Verizon Long Distance
Case No.: 02-0723-T-CN

6.	Commission Staff's Post Hearing Brief	Exhibit F
7	Commission Staff's Reply Brief	Exhibit G
8.	Commission Staff's Proposed Findings of Fact and Conclusions of Law	Exhibit H

Dated: January 9, 2002

LAW OFFICES OF JOSEPH G. DICKS, APC

By: _____
Joseph G. Dicks
Attorneys for Third Party North County Communications

EXHIBIT A

EXHIBIT **A**

BEFORE THE
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

CASE NO. 02-0254-T-C

NORTH COUNTY COMMUNICATIONS CORPORATION,

Complainant,

v.

VERIZON WEST VIRGINIA, INC.,

Defendant.

NORTH COUNTY COMMUNICATIONS CORPORATION'S INITIAL BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE THE
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

NORTH COUNTY COMMUNICATIONS CORPORATION,

Complainant,

v CASE NO. 02-0254-T-C

VERIZON WEST VIRGINIA, INC.,

Respondent.

INITIAL BRIEF OF NORTH COUNTY COMMUNICATIONS CORPORATION IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now North County Communications Corporation ("Complainant" or "NCC"), by counsel, and hereby tenders for the Commission's consideration its Initial Brief In Support of its Proposed Findings of Fact and Conclusions of Law.

I.

INTRODUCTION

The Telecommunications Age began with Samuel Morse's now-famous telegraph transmission from the U.S. Capitol *to* a rail station in Baltimore, forty miles away, on May *24,* 1844: "What God hath wrought!" It marked the first time in human history that communications had traveled faster than by foot or horseback. After initial resistance

to this technology. and despite President Abraham Lincoln's doubts that it could be accomplished, telegraph wires linked the remote West with the East on October 24, 1861. ***The 2,000 mile-long, pole-setting project took just 112 days to complete.'***

This case is about why, at the dawn of the twenty-first century, it takes ***six months*** for a company that traces its origins to Alexander Graham Bell to get a document filed with this Commission *and another* ***six*** *months* to connect one fully compatible network to another.

In the telecommunications industry, the watchword of the day is "competition," Competition at all levels. Competition among long-distance carriers. Competition among cell phone carriers. And especially, competition at the local level. A fundamental truth of this competitive world is that consumers are the winners when competition is allowed to take hold, and whether or not they immediately recognize it. they are the ultimate victims when anti-competitive practices limit their choices.

While the Telecommunications Act *of* 1996 had many notable goals, none was more so than the requirement that the former regional Bell operating companies ("RBOCs") release their monopoly over the local exchange market. As incumbents in the field, it was of paramount importance that the RBOCs interconnect their networks with those of competitive local exchange carriers ("CLECs"). The RBOCs' networks were built on the backs of the ratepayers over the years when consumers had no choice in their local service. With the passage *of* the Telecommunications Act of 1996, it was

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November 14, 2002 edition o i the San *Diego Union-Tribune* at page E-2.

time to pay back the ratepayers by giving them choices in how they spend their telecommunications dollars, while not forcing new service providers to duplicate expensive networks and pass those cost on to customers, who had already paid for the RBOCs' networks. It is in the RBOCs' economic interest to appear to be opening the local market to competition, while not actually doing so. NCC's experience with Verizon demonstrates that Verizon has acted according to this economic interest.

In this complaint case, the Commission heard three full days of testimony, and the more-than-occasional speech, which generated some 850 pages of transcript. Time constraints and greater prudence prevent the re-hashing and micro-analysis of every witness's testimony in this filing. But before beginning its analysis of the proceedings, NCC offers the following brief passage from the conclusion of the direct examination of Gale Givens, President and CEO of Verizon West Virginia, Inc., as perhaps the most telling of all motivations the Commission has to navigate in this proceeding:

> We try to treat all of the CLECs equally and in a manner that's [in] parity with our other customers **because that is** what we're required **to** do **in** order to get **271** relief. (Emphasis added.)

Hearing Transcript ("Tr "), Vol II, 89.

Ms. Givens is admittedly concerned not with what is fair, reasonable or in compliance with applicable law with respect to interconnection, but only what she feels will meet the minimum standards to get by for the purposes of getting into the long

distance market. In light of the fact that Verizon has met so little real opposition in getting 271 approval in other states, it has little concern that this Commission will hold it responsible for its unlawful behavior. Despite its success in other states, in West Virginia (and apparently in Maryland) Verizon is being called to account for a pattern of conduct that simply cannot be ignored: a policy to keep the competition out.

As will be explained in further detail below, the fact is, ***without regard*** *to* ***Verizon's desire*** *to* ***enter the long-distance market in West Virginia,*** Verizon West Virginia is and was required *to* treat CLECs fairly and in parity with its other customers under both state and federal law.[2] The record in this case demonstrates, clearly and convincingly, that Verizon's treatment of NCC failed to meet the appropriate standards under both state and federal law.

II.

THE LAW

NCC initiated this complaint proceeding under the provisions of West Virginia Code § 24-2-7. Subdivision (a) provides that

> Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements,

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[2] During a break in the recent 271 proceedings, Verizon general counsel Michael Lowe commented, "We have to show the same level of performance in the CLEC side that we do on the retail side." Article by Jim Balow appearing at www.wvgazette.com on November 8, 2002, entitled, "Competitors Cite Verizon Problems–Reliability of Service a Major Issue, StratusWave Tells *PSC."*

> practices. acts or services to be unjust. unreasonable. insufficient or unjustly discriminatory, or otherwise in violation of any of any provisions of this chapter, or shall find that anv services which is demanded cannot be reasonably obtained. the commission shall determine and declare, and by order fix reasonable measurements, regulations, acts, practices or services to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable. insufficient or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

Emphasis added

Despite Verizon's best efforts to the contrary there is far more than a simple contract action at stake here. Beyond the profound brow-beating that NCC took at Verizon's hands in its efforts to serve West Virginia businesses, and beyond what decision the Commission ultimately reaches in the 271 proceeding, this case provides the Commission an opportunity it otherwise would not have had to put an end to the interconnection nightmare Verizon puts CLECs through, as well as an opportunity to decide for West Virginia if Verizon will be the only LEC to competitively offer 555 calling.

The West Virginia and FCC rules provide guidance to the Commission in reviewing the adequacy of Verizon's conduct. While Rule 6.2 (g) *of* the Rules of Practice and Procedure, 150 WVCSR Series 7 ("Procedural Rules") generally places the burden *of* proof on the complainant in complaints before the commission, there are a number of significant exceptions in telecommunications cases *of* this variety.

Section 15.2 (a) of the Rules and Regulations for the Government of Telephone Utilities, 150 WVCSR Series 6 ("Telephone Rules") provides that

> Each incumbent local exchange carrier shall provide for interconnection between the facilities and equipment of any requesting telecommunications carrier and the incumbent's network:
>
> 1 For the transmission and routing of telephone exchange service and exchange access;
>
> 2. At any technically feasible point within the incumbent's network:
>
> 3. That is at least equal in quality to that provided by the incumbent to itself or to any subsidiary or affiliate to which the incumbent provides interconnection; and
>
> 4. On rates, terms, and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of the carriers' interconnection agreement and the requirements of § 15.2 and 15.4.a.

On the federal side, 47 C.F.R. § 51.305 further addresses an incumbent's interconnection obligations. The "equal in quality" provisions are contained in subsection (a) (3) and provide that

> *At* a minimum, this requires an incumbent to design interconnection facilities to meet the same technical criteria and service standards that are used within the ILEC's network. This obligation is not limited *to* a consideration of service quality as perceived by end-users, and includes, but

> is not limited to. service quality as perceived by the requesting telecommunications carrier[.] [3]

Other subsections *of* 47 C.F.R.§ 51.305 are equally compelling in this instance. Subsection (a) (5). which addresses just, reasonable and nondiscriminatory terms and conditions, means terms and conditions which are no less favorable than the ILEC provides itself, including, but not limited *to,* ***the time*** within which the ILEC provides such interconnection. Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is feasible at that point. Subsection (c). Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is feasible at that point at that level *of* quality. Subsection (d). And perhaps most significant for this Commission's immediate purposes, ***an ILEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.*** Subsection (e). At least with regard to any questions of network reliability and security, the ILEC's burden of proof is one of clear and convincing evidence that specific and significant adverse impacts would occur from the requested interconnection. First

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[3] In the Core Communications matter in Maryland, Verizon contended that service quality should not be measured against the service provided to end-users, because Verizon does not provide interconnection to end-users. The FCC regulation rejects this position, since it expressly ***does*** allow consideration of service quality as perceived by end-users. in addition to the CLEC's view *of* the service quality The hearing examiner in Maryland mocked Verizon's notion that "As long as we treat everyone in an equally inefficient and inept fashion. then we are providing parity." Attachment to NCC's Answer to Counterclaim, in the Matter of the Complaint of Core Communications v. Verizon Maryland, Case No. 8881, Hearing Examiner's Ruling on Interlocutory Motion, dated March 25, 2002.

Report and Order, In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, et al., F.C.C. 96-325 (Rel. August 8, 1996), ("Local Competition First Report and Order"), ¶ 203.

This heightened standard of proof has also been assumed voluntarily by Verizon in the interconnection agreement. Amendment No. 1, Part B, Page 9 is a critical provision of the Agreement pertaining to the interconnection issue:

> "TECHNICALLY FEASIBLE" is as defined in the FCC Interconnection Order. Interconnection, access to UNEs, Collocation, and other methods of achieving interconnection of access to UNEs at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a Telecommunications Carrier for such interconnection, access, or methods. A determination of technical feasibility does not include considerations of economic, accounting, billing, space, or site concerns. except that space and site concerns may be considered in circumstances where there is *no* possibility of expanding the space available. *The fact that an* **ILEC** *must modify* **its** *facilities or equipment to respond to such request does not determine whether satisfying* **such** *request is technically feasible. An ILEC that claims that it cannot satisfy such request because of adverse network reliabilityimpacts mustprove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.*

Emphasis added,

The West Virginia Supreme Court of Appeals has explained that "*[c]lear ... and convincing proof ... is the highest possible standard of civilproof defined as 'that*

measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be esfablished.'" Wheeling Dollar Savings & Trust Co. v. Singer, 162 W. Va. 502, 510, 250 S.E.2d 369 (1978).

In this case, for the Commission to rule in Verizon's favor, it must be as convinced of the strength of Verizon's evidence as it would be with the evidence needed *to* involuntarily commit a mentally ill person, strip a doctor of his license to practice medicine. take away a person's property without a written contract, or permanently transfer custody of a child. There is no way Verizon can or has sustained its burden here.[4]

III.

INTERCONNECTION

As the Commission observed from the evidence at hearing, Verizon's handling of the interconnection process with NCC, were it not so devastating to NCC and West Virginia consumers, might rightly be described as a comedy of errors. This hearing shone a beacon on a rudderless ship adrift at sea. With Verizon demonstrating "no

[4] This burden has been applied in a variety of high-level settings requiring a high level of proof, such as mental health involuntary commitment proceedings [Markey v. Wachtel, 164 W. Va. 45, 264 S.E.2d 437(1979)], estoppel to deprive an owner of legal title to real estate [Barnes v Cole, 77 W. Va. 704, 88 S.E. 184 (1916)], decree for specific performance [Wayne Gas Co. v Southern W. Va. Oil & Gas Corp., 148 W. Va. 685. 137 S.E.2d 219 (1964)], establish parol contract to devise real estate [Mullins v. Green, 143 W. Va. 388, *105* S.E.2d 542 (1958), disciplinary action against a physician [Webb v. West Virginia Board of Medicine, 212 S.E 2d 149, 569 S E. 2d 225 (2002), public figure's burden in a defamation action [Greenfield v. Schmidt Baking Co., Inc., 199 W. Va. 447. 485 S.E.2d 391 (1997)], transfers of custody back *to* a natural parent [Overfield v Collins, 199 W. Va. 27, 483 S.E 2d 27 (1996)], and equitable adoption [Wheeling Dollar Savings & Trust Co v. Singer, 162 W. Va. 502, 250 S.E.2d 369 (1978)].

degree of continuity of service," the evidence prompted Chairman Williams to inquire of Don Albert, Verizon's Director of Network Engineering, "Does your boss operate, like you, without rules or guidance or procedure, but using *just* experience to make these determinations." Tr. Vol. III, 209, 211

The Pre-Approval Process

From the time when NCC informed Verizon that it elected to opt into the MCImetro Interconnection Agreement ("ICA") until the time the corresponding petition was filed. more than six months passed. Compare NCC **Ex.** 3-A, July 5, 2000 letter, with Case No. 01-0167-T-PC, Petition filed on January 17, 2001. Under anybody's definition of timeliness, this was grossly unacceptable.

Evidently one month of delay was devoted to Verizon's attorneys alleged investigation into the "chat-line" issue. Tr. Vol. II, 91-94. Verizon had no legal basis to delay processing of NCC's ICA for such an investigation. Verizon produced none of the attorneys allegedly involved in this investigation and filed no pre-filed testimony on this issue to explain the initial delay in responding to NCC's opt-in request, instead putting the company president on the stand to muse as to her "understandings." If the truth be told, when she wasn't making a speech, Ms. Givens testified to little more than her "understandings." Unlike Todd Lesser, NCC's President and CEO, Ms. Givens had no direct, contemporaneous, day-to-day involvement whatsoever into any aspect of any consequence. Tr. Vol. II, 116. Make no mistake, her appearance **here** was window-

dressing. pure and simple, designed to impress this Commission with an appearance by the corporate president, and nothing more,

Eventually the chat-line issue turned out to be a non-issue. Verizon knows, and knew, full well that there is nothing improper or illegal about chat-lines, the modern day equivalent to the town-crier's soapbox. Verizon knows this, because as it turns out, as Ms. Givens admitted, Verizon carries chat line traffic and further admits that it is perfectly legal. Tr., Vol. II, 104-105. In a truly unrivaled display of arrogance, and a total disregard for NCC's rights, Ms. Givens dismissed this delay as "only one month." Tr., Vol. II, 94, 96.

Verizon admitted to a two-month delay after the return *of* the necessary paperwork from NCC, although the delay itself may have been longer. Verizon conceded it had no explanation whatsoever for the delay. Tr., Vol. II, 73, 96.

Next, Verizon prepared, without explanation, a "joint petition" for filing with the Commission, even though this was never requested by NCC. Tr. Vol. II, 97-99. Verizon offered no evidence at hearing as to what delayed an essentially pro-forma matter so long.

Mr. Lesser testified how during this time frame he repeatedly supplied and re-supplied Verizon with customer information, information which should have been in its hands already, since NCC was an existing customer *of* Verizon, providing long-distance service in New York for the past ten years. Tr., Vol. I, 51, 76. He had no contact with a living, breathing Verizon employee from when Verizon was first contacted by mail to

begin the interconnection process in April of 2000 until eight months passed. NCC Ex. 3-A, NCC Ex. 1: 6. In late December, 2000, Mr. Lesser was finally contacted by a Verizon representative who would supply him with a multitude of surprises in the coming year and beyond: Dianne McKernan.

Dianne McKernan and "The Policy"

Verizon Services Corporation, among other functions, provides interconnection services to its affiliated ILEC, such as Verizon West Virginia,. Inc. Verizon Services Corporation employs Ms. McKernan as an Account Manager. Verizon Ex. 2: 1. On January 17, 2001, Ms. McKernan informed Mr. Lesser that she would be his account manager for all his Verizon needs, "coast to coast." NCC Ex. 3-C-002. In essence, Verizon has set up Ms. McKernan as the keeper of the gate through which NCC must pass if it wishes to gain entry into markets where Verizon is the incumbent. Ms. Givens conceded that Ms. McKernan has the authority to bind Verizon West Virginia in her capacity as account manager and that it would be reasonable for NCC to rely upon Ms. McKernan's representations to him. Tr. Vol. II, 112-115.

In December of 1999, the Verizon departments that handled CLECs and IXCs combined forces into one department. Previously Ms. McKernan had worked with long-distance carriers. During 2000, Ms. McKernan started to work with CLECs, but only CLECs that were already established with Verizon. At that time, no one in the former Bell Atlantic territory had experience dealing with CLECs. In particular, Ms. McKernan

had nc experience dealing with CLECs who were new to Verizon territory. Tr., Vol. II, 208-209. 270-272, 284.

Despite the importance *to* Congress and to West Virginia of making the CLEC program work, Verizon assigned an account representative without the necessary qualifications and experience to a CLEC eager to do business in West Virginia.' During their first phone call, Mr. Lesser discussed interconnecting in West Virginia and Access Service Requests ("ASRs"); Ms. McKernan "wasn't really familiar with what he was talking about." Tr., Vol. II, 199. Ms. McKernan professesthat the CLEC Handbook is her Bible, she has no idea what's in the ICA. and she couldn't understand the ICA even if she tried to read it. Tr., Vol II. 249. The ICA has been approved by the Commission, whereas the CLEC Handbook, a large, unilaterally-written document, has not. It apparently was not until April of 2001 that Ms. McKernan participated in a three-day training seminar for new account managers which she described as "quite overwhelming."[6] Tr., Vol. II, 271-272.

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[3] Verizon attempts *to* justify its lackadaisical approach to the whole CLEC relationship in West Virginia by pointing out that many CLECs sign interconnection agreements **but** never do any business in West Virginia. Tr. Vol II, 101-102. After hearing of NCC's experience, it is no wonderwhy more CLECs aren'ttrying to do business in West Virginia and why Verizon controls 96 % *of* the local exchange lines in West Virginia.

[5] Because Verizon was not prepared at the time of hearing to assist *the* Commission in its efforts to understand how :he Verizon-CLEC process is supposed to work, in response to an in-hearing request Verizon submitted an affidavit from Ms. McKernan's superior, Maryellen T. Langstine. That Ms. McKernan could not explain this process herself speaks volumes. *If* anything, comparing this affidavit with Ms. McKernan's testimony demonstrates that things are *not* the way they are supposed to be at Verizon. For Instance, ai the 271 hearing, Ms. Langstine testified an account manager has the ICA for every CLEC she handles. Transcript, Volume I of § 271 proceeding, at pages 179-179. As mentioned above, Ms. McKernan testified she couldn't even understand the ICA if she tried.

NCC Exhibit 3-C (001-030) contains the trail of e-mails which demonstrate the run-around Verizon put NCC through in order to get two T1s up and running. In discussing the "pre-ASR meeting" in January of 2001, Ms. McKernan indicated that, "It was on that call we determined you needed to build an Entrance Facility because ***you could not*** use *a* non-wholesale market entrance." NCC Ex. 3-C-009. And thus, Verizon would have you believe, a policy was born in West Virginia. So that there was no confusion, the policy was repeated on several occasions, by more than one Verizon employee.

On October 5, 2001, Ms. McKernan submitted an affidavit reciting for the benefit of the Maryland Public Service Commission in *Core Communications v. Verizon Maryland*, Case No. 8881, in no uncertain terms, and presumably with the assistance of counsel, the content of the call referenced in the immediately preceding paragraph:

> Mr. Lesser was advised that Verizon **uses** only dedicated entrance facilities for the installation ***of*** interconnection trunks with carriers.

NCC Ex. 3-F. Very clear and unequivocal.

Verizon proudly defended its policy in Maryland, declaring that Verizon uses dedicated facilities with all carriers, including CLECs and IXCs. NCC Ex. 8. Verizon declared it does not use high-capacity outside plant loop facilities for purposes of interconnecting with CLECs and IXCs. Steve Molnar, regulatory analyst for the Telecommunications Division of the Maryland PSC, and an active participant in the *Core*

Communications matter recognized this for what it was . . . Verizon's standard policy.[7]

NCC Ex. 3-L

In conjunction with NCC's attempted interconnection with Verizon North and Verizon South in Illinois. Ms. McKernan, again acting as NCC's account manager, stated:

> It took a bit of investigating to get the Verizon West[8] policy on terminating interconnection trunks on enterprise facilities. Unfortunately the West policy is the same as the East.[9] We will not terminate interconnection trunks on a **retail/enterprise** facility.

NCC **Ex.** 3-C-033. Again, clear and unequivocal

Also contained in NCC. Ex. 3-C-033 is the preceding attached e-mail from Charles Bartholomew:

> We received word from Product Management that the Verizon West policy is the same as the East. The CLEC may not terminate interconnection trunks **on** a retail facility.

The same policy, quite clear and quite unequivocal, from another Verizon employee.

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[7] Recognizing that the policy had fallen flat in Maryland and compelled to resort to the "case-by-case practice," Mr. Albert acknowledged that Verizon evidently doesn't follow the "practice" in Maryland. Tr., Vol. III, 125, 145-146, 196-197.

[8] Verizon West refers to the old GTE territory.

[9] Verizon East refers to the old Bell Atlantic territory

The list goes on. In conjunction with NCC's attempted interconnection with Verizon New York in New York, Ms. McKernan. in her capacity as NCC's account manager, informs Mr. Lesser that the code where he would like to interconnect trunks "is a shared mux and **cannot be used for wholesale services.**" NCC *Ex.* 3-C-031. Verizon's position is susceptible to only one meaning.[10]

On September 23, 2002, three days afler Verizon pre-filed Ms. McKernan'sdirect testimony in this case, Ms. McKernan sent Mr. Lesser an e-mail containing the following eye-opening passage:

> I am told there is no hard and fast 'policy,' but a general practice of using dedicated interoffice to interconnect with other carriers (both IXCs and CLECs), since virtually all carriers in New York have large volumes of traffic that cannot be provisioned over shared loop facilities. This is not a 'policy' but a fact. I have been informed that Verizon's technology and equipment deployment decisions for implementing initial interconnection turning arrangements with a CLEC are made on a case-by-case basis. . . .

[10] Even communication between counsel reinforced the policy. On February 11, 2002, NCC's counsel, Mr. Dicks, wrote to Steven Hartrnann, a Verizon employee and Senior Counsel for Carrier Relations, that "Over and over, NCC is being told that it may not interconnect at a "retail facility" and must, instead, await a dedicated fiber 'wholesale' build-out." Verizon Ex. 4-C. NCC attempted to resolve these matters by having the parties agree to the use of an interim facility while the wholesale builds were taking place. NCC was willing to resolve the entirety of this matter **without any payment for damages *or* attorney's fees.** Mr. Hanrnann's response showed that Verizon had no intention of backing off on the policy: "In no way was Verizon obligated to provide such an interim arrangement under the terms of its interconnection agreement with NCC, but Verizon did so as a courtesy to NCC with the clear understanding and commitment by NCC that Verizon's originating interconnection traffic would be moved *to* the dedicated facility when that facility was finished." Verizon Ex. 4-D.. In fact, interconnection as eventually accomplished was not a 'courtesy." but rather required at any technically feasible point selected by the CLEC. Moreover, section 4.1.1 of the ICA requires the parties to make all reasonable efforts and cooperate in good faith to develop alternative solutions to accommodate orders when facilities are not available.

What happened to the "policy"? At trial Ms. McKernan testified that she made the whole thing up as a way to impress Mr. Lesser. And the "policy" was replaced with Mr. Albert's casa-by-case "practice." Tr., Vol. II, 223-224.

The truth is, what happened was the litigation. The truth is, there ***is***, most certainly, a policy. There was no ambiguity of any sort concerning the policy's existence in any of the preceding e-mails. What happened was Verizon's policy was rightly and soundly rejected in Maryland. See Attachment to NCC's Answer to Verizon Counterclaim, Hearing Examiners Ruling on Interlocutory Motion: *Core Communications v. Verizon Maryland*, Case No. 8881, dated March 25, 2002. When the "policy" didn't work as a litigation strategy, Verizon switched to the "practice" as its new litigation strategy. In Maryland, Verizon had a panel of three experts testify in defense of the policy *not* to interconnect with CLECs at shared facilities. See, NCC Ex. 3-K, 8. In the present case, Verizon submitted Mr. Albert's testimony citing a completely new position, in complete contradiction to the Maryland panel testimony, ***after*** the panel in Maryland had concluded.

Why was there no mention of Ms. McKernan's embellishment of a "policy" in her pre-filed direct or rebuttal testimony, or in the pre-filed testimony of any other witness for that matter? Because. after ***investigating***, she found out ***from Product Management*** that the policy is the same in the West as in the East. NCC Ex. 3-B-033. Verizon's deliberate failure *to* produce Charles Bartholomew at trial to explain otherwise is Verizon's problem, especially after it refused to consent to his deposition. There most